LIBRARY
SUPREME COURT, U. S.
Supreme Court, U.
FILED
APR 5 1974
MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1494

ROBERT MAHER,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GUSTAVE H. NEWMAN
522 Fifth Avenue
New York, New York 10036
Counsel for Petitioner

GERALD L. SHARGEL
Of Counsel

March 29, 1974

I N D E X

	Page
Opinion Below.....	1
Jurisdiction.....	2
Constitutional Provisions and Statutory Provisions Involved.....	2
Statement of the Case.....	3
Reasons for Granting the Writ.....	5
POINT ONE--PETITIONER'S CONSTITUTIONAL RIGHT TO DUE PROCESS WAS DENIED BY THE MANNER IN WHICH THE INSTANT CASE PROCEEDED TO TRIAL.....	6
POINT TWO--THE PROSECUTION OF THE INDICTMENT WAS BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL.....	11
Conclusion.....	13
Appendix A.....	14
Decision and Opinion of the Court of Appeals..	16

CITATIONS

	Page
Cases	
U.S. v. Marion, 404 U.S. 307 (1971).....	9
U.S. v. Oppenheimer, 242 U.S. 85 (1960).....	12
Sealfon v. U.S., 332 U.S. 575 (1948).....	12
Harris v. Washington, 404 U.S. 55 (1971).....	12
Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189...	12
Statutory Provisions	
Title 21, U.S.C., Sections 174 and 174.....	1,3,14
Title 28, U.S.C., Section 1244 (1).....	2
Rules	
Rule 19 (1) of the Federal Rules of Criminal Pr.	2
United States Constitution	
Fifth Amendment.....	3,14
Sixth Amendment.....	3,14

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No.

Robert Maher,

Petitioner,

v.

United States of America

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The Petitioner, Robert Maher, prays that a Writ of Certiorari issue to review the judgment entered on March 13, 1974 by the United States Court of Appeals for the Second Circuit in the proceeding entitled United States of America, Appellee vs. Robert Maher, Appellant, Docket No. 74-1146.

OPINION BELOW

The United States Court of Appeals for the Second Circuit, by judgment entered March 13, 1974 under Docket No. 74-1146, unanimously affirmed a judgment in the United States District Court for the Southern District of New York which convicted the Petitioner for violation of Title 21, U.S.C.,

Sections 173 and 174, after trial before District Judge Lloyd McMahon and a jury.

The judgment was unanimously affirmed without opinion and there are no other written opinions in question in this case.

JURISDICTION

The judgment of the Court of Appeals was entered on March 13, 1974. The jurisdiction of this Court was invoked under Title 28, U.S.C., Section 1244 (1) and under Rule 19 (1) of the rules of this Court. The questions presented for review are as follows:

1. Whether the Petitioner's right to due process of law was denied by the pre-accusatory delay and the Trial Court's denial of counsel's Motion for a one-week adjournment to prepare a defense to an Indictment that had been filed less than one month earlier?

2. Whether the prosecution of the Indictment herein was barred by the doctrine of collateral estoppel?

CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS INVOLVED

1. The Constitutional provisions involved are

the due process clause of the Fifth Amendment of the United States Constitution and the right of counsel clause of the Sixth Amendment of the United States Constitution.

2. The Statutes involved are Title 21, U.S.C., Sections 173 and 174. Each of the foregoing are set forth in Appendix A of this Petition.

STATEMENT OF THE CASE

The Petitioner, Robert Maher, was convicted for the Statutory violations previously referred to. As a result of said conviction, he was sentenced to the custody of the Attorney General for a period of ten years on each count to run concurrently. He had been indicted together with three other persons in a five count indictment. He proceeded to trial with just one other defendant who was named in only three counts of the five count indictment. The jury could not agree on the other three counts and a mistrial was accordingly declared as to those three counts. This Petitioner was convicted of the remaining two counts. The Petitioner is presently in custody, serving that sentence.

The Petitioner, Maher, was indicted on October 17, 1973. The indictment was opened on October 23, 1973. A pre-trial conference was set for October 26, 1973 and the case was set for trial on November 12, 1973. The events alluded to in the indictment were the subject of prior State proceedings and occurred between November 1969 and November 1971. On the date set for trial, Petitioner's trial counsel requested a one-week adjournment since his previously retained counsel had suffered a heart attack. New counsel required a week to prepare the case for trial and obtain certain witnesses. It should be noted that the pre-indictment delay was attacked in pre-trial motions and also in a motion during the trial. The chief witnesses for the prosecution were the common law wives of a deceased co-defendant. A portion of the alleged contraband had been the subject matter of a prior New York State indictment in Kings County of which the Petitioner had been acquitted. Objection to the production of this contraband and its admission into evidence were made. The objection to the introduction of the contraband was sustained, not on the claimed grounds, but based

on the failure of the prosecution to sufficiently identify it. Nevertheless, it was allowed to remain in open view in the presence of the jury. The Petitioner testified in his own behalf. He sought the production of a police officer witness but, due to the time requirements, could not physically produce him and he stipulated as to what the proposed testimony of the witness would be. The testimony of the two prime government witnesses were totally not specific as to the dates of these alleged occurrences.

REASONS FOR GRANTING THE WRIT

The decisions below raise a serious question as to the Petitioner having received a fair trial with the proper assistance of counsel as a result of the government waiting two years to indict and the Petitioner having to proceed to trial within twenty days. In addition to the foregoing, a serious question was raised concerning the evidence which had been the subject matter of a prior acquittal. Yet, this material was allowed to be displayed to the jury to remain in open view and by its very nature would prejudice this Petitioner.

POINT ONE

PETITIONER'S CONSTITUTIONAL RIGHT TO DUE PROCESS WAS DENIED BY THE MANNER IN WHICH THE INSTANT CASE PROCEEDED TO TRIAL.

In affirming the conviction below, the Court of Appeals apparently condoned a lengthy pre-indictment delay coupled with an unusually short amount of time afforded for trial preparation where unusual circumstances were present. The indictment in the instant case charged a conspiracy which was alleged to have occurred between January 1968 to January 1973. Despite the allegation that the conspiracy continued until the first month of 1973, the last overt act pleaded was alleged to have occurred on November 2, 1971. The substantive charges in the indictment were stated to have occurred in October and November of 1969 and February and March of 1971. Federal prosecution of this matter, however, did not commence until October 17, 1973 when a sealed indictment was filed. The appellant first learned of the charges when he was brought to Court on that sealed indictment on October 23, 1973.

On October 26, 1973, a pre-trial conference was held before the District Court and the matter was set for trial on November 12, 1973, three weeks after

On the day of trial, Petitioner's counsel called to the attention of the District Court that counsel who had previously represented the Petitioner had suffered a heart attack shortly after the Petitioner's arraignment and that this occurrence caused the Petitioner to retain new counsel. In the hiatus between the time that prior counsel had fallen ill and new counsel was retained, the case had been referred to an attorney by the name of Paul Victor who was ordered by the Court to remain present during the trial (T 19)*.

On the basis of the fact that new counsel had been retained and additionally on the fact that the conspiracy charged was complex, the new attorney sought an adjournment of the matter. The adjournment requested was for a period of "no more than a week". (A 23). In sum, counsel was asking for an "opportunity to fully acquaint (himself) with the facts in this case to prepare for my client's defense." (A 23). The situation, therefore, was that

*The letter "T" refers to the trial transcript, while the letter "A" refers to the Petitioner's Appendix on file with the Circuit Court of Appeals.

counsel retained within a week prior to trial because of a fortuitous circumstance was denied an opportunity to more carefully prepare a case which was based upon acts alleged to have occurred as early as 1968 and which had been the subject of prior litigation on which other counsel had been familiar. This set of facts must again be considered in the context of an instance where the trial was beginning some three weeks after the indictment was unsealed.

Moreover, prior to trial, Petitioner's counsel joined in a motion of co-counsel for dismissal of the indictment on the grounds of unnecessary pre-trial delay. (A 25-28). This motion was renewed at the end of the entire case on the ground that there was nothing developed at trial to justify a delay of more than two and one-half years during which the government was obviously in possession of all the facts on which the indictment was returned. (T 480-1).

Petitioner's attack on due process grounds is predicated upon the unexplained and unjustified delay in securing an indictment from a Federal Grand Jury where the investigation had obviously been completed years earlier together with a totally unreasonable urgency in which the case was tried.

This Court in U.S. v. Marion, 404 U.S. 307 (1971) recognized that events at trial could demonstrate a due process violation because of pre-accusatory delay. In the Circuit Court of Appeals, the Petitioner called attention to the extraordinary vagueness in the manner in which the prosecution witnesses recalled the events which the government relied upon in support of the indictment. For example, as to the time that the principle witness, Doris Olivero, allegedly began to purchase heroin from the named conspirators, the testimony was unable to fix, with certainty, a month and year. (T 107-8). As to the allegation of the alleged sales, the witness' recollection was equally as vague. (T 115). Continued testimony of the witness established the fading of memory. (T 123).

Again, the problem raised herein is even more complicated by the fact that after a substantial delay which was in no way attributable to the Petitioner but the Court's refusal to grant a continuance of "no more than a week" was the proverbial salt in the wound. For, if the Petitioner was placed in a situation where the defense of a criminal case was made more difficult by the passage of time, a request

for another week after only three weeks had passed since the Petitioner had been apprised of the charges against him is, it is respectfully submitted, unconscionable. In other words, if this Court were to hold that the Petitioner's Constitutional rights were not violated by the pre-accusatory delay, there would still be no question that defense of these charges were relatively complex, if only because of the time factor. Therefore, it is submitted, the failure to grant a one-week postponement where good cause was shown, amounts to nothing less than a due process violation. In view of the circumstances, it would not seem unreasonable if counsel had simply asked for another week to give more thought to the case. Here, far more tangible reasons were proffered, including the fact that prior counsel, totally familiar with the facts of the case, had been stricken with a heart attack. The arbitrariness of the Court in denying counsel's Motion for an adjournment has, it is respectfully submitted, distorted the very meaning of due process.

POINT TWO

THE PROSECUTION OF THE INDICTMENT WAS BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL.

The two counts charged the Petitioner with possession. A cache of heroin was offered into evidence against the Petitioner. This material was seized in Brooklyn and was the subject of a State trial for possession. The witness who testified concerning it, one Doris Olivero, clearly established this material to be the very same material she allegedly purchased from the Petitioner and stored in a residence in Brooklyn. This is the same material that this very same witness testified to in the State trial in Brooklyn. As previously indicated, the Petitioner was acquitted in Brooklyn. This very same material was offered in evidence at the trial at bar. Objection was made to its admission on the grounds of collateral estoppel and double jeopardy. This objection was overruled. The material was displayed to the jury and it was only excluded from evidence because of the officer's inability to testify concerning the complete chain of connection. Despite this, the material remained in the plain view of the jury throughout the trial. The harmful and inflammatory effect of the physical appearance of heroin re-

It has long been established that a former judgment bars the relitigation of the ultimate issues of fact which have been determined by that final judgment. U.S. v. Oppenheimer, 242 U.S. 85 (1960). This rule of collateral estoppel is not to be applied with any restricted, archaic or hypertechnical view. Sealfon v. U.S., 332 U.S. 575 (1948). The doctrine of collateral estoppel as a viable force in criminal cases was re-emphasized in Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189. The principle has been held to be operable between State and Federal jurisdiction. Harris v. Washington, 404 U.S. 55 (1971).

The ultimate issues concerning this Petitioner's exercise of dominion and control over the contraband and his connection therewith were determined in the Kings County State trial. We recognize that the other count of which he was convicted did not relate to this material, but we stress that this was the only physical evidence and we repeat that its highly inflammatory potential had to spill over to the other count.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

GUSTAVE H. NEWMAN
Attorney for Petitioner
522 Fifth Avenue
New York, New York 10036

GERALD L. SHARGEL
Of Counsel

MARCH 29, 1974

APPENDIX A

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

AMENDMENT V TO THE UNITED STATES CONSTITUTION

"no person shall***be deprived of life, liberty or property without due process of law***"

AMENDMENT VI TO THE UNITED STATES CONSTITUTION

"In all criminal prosecutions the accused shall enjoy the right***to have the Assistance of Counsel for his defence."

TITLE 21, U.S. CODE, SECTION 173

"Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.

It is unlawful to import or bring any narcotic drug into the United States or any territory under its control of jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported."

TITLE 21, U.S. CODE, SECTION 174

"§174. Same; penalty; evidence

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or received, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being im-

ported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000."

DECISION AND OPINION OF THE UNITED STATES COURT OF APPEALS.

UNITED STATES COURT OF APPEALS
For The
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of March, one thousand nine hundred and seventy-four.

Present: HON. PAUL R. HAYS
HON. WILLIAM H. TIMBERS
Circuit Judges
HON. OSCAR H. DAVIS
Court of Claims

United States of America,
Plaintiff-Appellee,

v.

Angelo Trabacchi, Robert Maher, Eligio Matos and Charles Dancil,
Defendants,

Robert Maher,
Defendant-Appellant.

74-1146

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by

ON CONSIDERATION WHEREOF, it is now hereby ordered adjudged and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO, Clerk

By VINCENT A. CARLIN, Chief Deputy Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1494

ROBERT MAHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that a pre-indictment delay of 23 months deprived him of due process of law, that the trial court erred in refusing to grant his motion for continuance made on the morning of the trial, and that prosecution on one of the two counts on which he was convicted was barred by double jeopardy or collateral estoppel.

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of two counts of selling heroin, in violation of 21 U.S.C. (1964 ed.) 173 and 174. He was sentenced to ten years' imprisonment and fined $5,000 on each count, the sentences and fines to be concurrent. The court of appeals affirmed (Pet. App. 16).

The facts are undisputed. They establish that in February and March of 1971 petitioner made two sales of heroin to Doris and Santiago Olivero (T. 113-115, 122-124). Doris Olivero was the government's principal witness at

trial. The day after the second sale, Mrs. Olivero turned the heroin over to New York police (T. 125-126), and it was produced at trial; however, because the government did not adequately prove the chain of custody, the court ruled the heroin inadmissible and instructed the jury to disregard it (T. 349).

1. Petitioner contends that the delay of about 23 months between the date of the last overt act charged in the conspiracy count[1] and the date on which the indictment was returned deprived him of due process. This contention is without merit.

While this Court recognized in *United States* v. *Marion*, 404 U.S. 307, that in some circumstances pre-indictment delay may amount to a denial of due process, it further stated that, absent a showing of actual prejudice in the conduct of the trial and intentional delay by the government to gain a tactical advantage, no such denial is shown. *Id.* at 324, 325. Since there is no suggestion in this case that the period of delay resulted in prejudice to petitioner or that the delay was caused by such an improper motive on the part of the government, there was no denial of due process.

Petitioner's only complaint is that the pre-indictment delay caused the fading of memory on the part of the government's principal witness, Doris Olivero (Pet. 9). However, this factor would normally hurt the government's case and not the defendant's. This is especially true where, as here, petitioner's defense was a blanket denial of the charges (T. 462). Petitioner does not allege any prejudice arising from inability to locate witnesses or to secure evidence; nor does he claim that the delay affected his ability

---

[1]The jury was unable to reach a verdict on the conspiracy count and on two other counts involving sales of heroin; a mistrial was granted as to those counts.

to recall the events surrounding these charges. Under the circumstances, the pre-indictment delay did not deprive petitioner of a fair trial.

2. Petitioner contends that the trial court committed reversible error by refusing to grant his motion for a continuance made just prior to trial.

Petitioner was arraigned on October 23, 1973, and was represented at that time by an attorney. This attorney suffered a heart attack shortly after the arraignment, and at that time the case was referred to his associate, Paul Victor, Esq. On the morning of the trial, Monday, November 12, 1973, Stephen Russo, Esq., informed the court that he had been retained by petitioner the preceding Thursday (November 8, 1973) and would be representing petitioner (T. 4-5). Mr. Russo's motion for a continuance of one week was denied (T. 6-7). Mr. Victor did appear, and both he and Mr. Russo were present during the trial (T. 19-20).

In his request for a continuance, although he stated vaguely that he was unable to find certain witnesses, that he wanted to do some investigation, and that he had not had enough time to review the government's Section 3500 material (T. 5-6), Mr. Russo also stated (T. 6):

> * * * I am in a position where I can try the case. I am conversant with essential facts * * *.

The court noted that counsel normally does not receive Section 3500 material until after the witness testified (T. 7) and pointed out that petitioner had had time to substitute counsel if he so desired without waiting until just before the trial (T. 19-20).

Mr. Victor had been granted access to almost all of the government's Section 3500 material a full week prior to trial and had spent hours reviewing the material

and making notes. Mr. Russo had also been granted access to a portion of these materials on the Friday preceding the trial (T. 7). Petitioner had the benefit of the counsel of both Mr. Victor and Mr. Russo at trial.

Under these circumstances, there was clearly no abuse of the court's discretion in denying petitioner's last minute request for a continuance. *United States* v. *Rosenthal*, 470 F. 2d 837, 844 (C.A. 2), certiorari denied, 412 U.S. 909; *United States ex rel. Baskerville* v. *Deegan*, 428 F. 2d 714, 716-717 (C.A. 2), certiorari denied, 400 U.S. 928. See *Ungar* v. *Sarafite*, 376 U.S. 575, 589.

3. After his arrest by New York City detectives in March 1971, petitioner was indicted by a New York State grand jury on charges of conspiracy and possession of heroin. The heroin allegedly possessed was the same heroin that had been sold to Doris Olivero, and which underlay Count Five of the federal indictment. Doris Olivero testified at the state trial, and the facts were essentially the same as those to which she testified with respect to Count Five in the trial in this case.

At the conclusion of the State's case, the New York court entered an order dismissing the charges pursuant to Section 290.10 of the New York Criminal Procedure Law (McKinney, 1971, Vol. 11A), on the ground that the evidence produced was not legally sufficient to establish the offenses charged (C.A. App. 13).

Petitioner contends that the conviction below on Count Five was barred by the double jeopardy clause or alternatively, that the government was collaterally estopped from introducing against him the evidence which had

been presented at the New York trial.[2] Whatever the merits of petitioner's double jeopardy and collateral estoppel claims, they do not affect his conviction under Count Four, as petitioner recognizes (Pet. 12). Since the sentence received on Count Five was identical with and concurrent to the sentence received on Count Four, there is no occasion for the Court to reach this contention. *Barnes* v. *United States*, 412 U.S. 837, 848, n. 16. In any event, petitioner's claims are without merit.

A prior state trial does not bar a subsequent federal prosecution for the same offense. *Abbate* v. *United States*, 359 U.S. 187, 193-196. Similarly, a prior state acquittal does not collaterally estop the United States, which was not a party to the prior proceeding, from contesting facts previously determined in the defendant's favor. *Martin* v. *Rose*, 481 F. 2d 658, 660 (C.A. 6), certiorari denied, 414 U.S. 876; *United States* v. *Feinberg*, 383 F. 2d 60, 71 (C.A. 2), certiorari denied, 389 U.S. 1044.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1974.

---

[2]The evidence referred to is the testimony of Doris Olivero; the heroin itself was not admitted at the federal trial.

[3]Petitioner's reliance on *Harris* v. *Washington*, 404 U.S. 55, for the proposition that collateral estoppel is operable between state and federal jurisdictions (Pet. 12) is misplaced. That case involved two subsequent state prosecutions.

Although under the circumstances we deem it unnecessary to discuss the issue, the United States does not concede that the New York dismissal for legally insufficient evidence resulted in a fact determination in petitioner's favor.